

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
XO Communications Services, Inc.)
For Authority to Provide Its
Security in Connection with
Financing.)
_____)

DOCKET NO. 2008-0053

DECISION AND ORDER

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DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

PUBLIC UTILITIES
COMMISSION

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FILED

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XO Communications Services, Inc.)
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Docket No. 2008-0053

DECISION AND ORDER

By this Decision and Order, the commission waives the requirements of Hawaii Revised Statutes ("HRS") §§ 269-17 and 269-19 and Hawaii Administrative Rules ("HAR") §§ 6-61-101 and 6-61-105, to the extent applicable, with respect to XO COMMUNICATIONS SERVICES, INC.'s ("XOCS")¹ request for approval to provide its guarantee and security in connection with its parent, XO Communications, LLC's ("XO"), issuance and sale of up to \$145 million of its Senior Notes ("Proposed Refinancing").

¹In September 2004, the commission approved an internal corporate organization wherein an affiliate of XOCS, XO Long Distance Services, Inc., formerly known as NEXTLINK Long Distance Services, Inc. ("XOLD"), merged into XOCS. In doing so, the commission also approved the transfer of XOLD's certificate of authority to provide intrastate telecommunications services on a resold basis in the State of Hawaii ("State") to XOCS. See In re XO Long Distance Services, Inc. and XO Communications Services, Inc., Docket No. 04-0177, Decision and Order No. 21360, filed on September 22, 2004.

I.

Background

A.

Application

On March 24, 2008, XOCS filed a Petition ("Petition") for commission approval to provide its guarantee and security in connection with XO's Proposed Refinancing, pursuant to HRS §§ 269-17 and 269-19.² Moreover, pursuant to HRS § 269-16.9, XOCS requests that the commission waive the filing requirements of HAR § 6-61-101 or, alternatively waive any remaining provisions not satisfied through the materials filed with its Petition.

According to XOCS, XO intends to issue and sell up to \$145 million of its Senior Notes due April 15, 2009, pursuant to the Note Purchase Agreement dated March 13, 2008 ("Agreement"). XOCS states that the obligations under the Senior Notes will be guaranteed by XO's parent, XO Holdings, Inc.; various subsidiaries of XO; and, upon receipt of the required regulatory approvals, XOCS. The terms of the Agreement are summarized on page 3 of the Petition.

XOCS states that the Proposed Refinancing is not expected to directly affect, in any way: (1) XOCS's rates or services; (2) its operating affiliates; or (3) result in the change of control of XOCS or its operating affiliates.

²XOCS served copies of the Petition on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex officio party to all proceedings before the commission. See HRS § 269-51; HAR § 6-61-62.

According to XOCS, approval of its Petition will serve the public interest by enhancing XOCS's ability to grow and compete in the "highly competitive" markets for telecommunications services in the State and nationwide. It also contends that since "XOCS is a non-dominant carrier, it is not subject to rate of return regulation" and that the "source of [its] funds and capital structure of the company would have little effect on customers in Hawaii or elsewhere."³ XOCS states that in the unlikely event that its capital structure becomes too costly and rates rise, customers could simply migrate to carriers with preferred rates.

Moreover, XOCS contends that since the public interest is best served by assuring the presence of numerous telecommunications competitors in the State, "it is important to provide such competitors with the flexibility to arrange financing in the manner they deem most appropriate to carry on business so long as there is not adverse impact on the public."⁴

B.

Consumer Advocate's Position

On April 22, 2008, the Consumer Advocate filed its Statement of Position ("CA's SOP") informing the commission that it does not object to XOCS's request. Alternatively, the Consumer Advocate recommends that the commission waive its approval authority under HRS §§ 269-17 and 269-19. Moreover,

³See Petition at 4-5.

⁴Id. at 5.

the Consumer Advocate states that it had not received copies of XOCS's Annual Report of Resellers and Various Telecommunications Services ("Annual Financial Report") for the years ended December 31, 2005, through December 31, 2007. Accordingly, the Consumer Advocate recommends that the commission in this Decision and Order require XOCS to submit copies of these reports, pursuant to HAR § 6-80-91(d).

II.

Discussion

A.

Proposed Refinancing

HRS § 269-16.9(e) allows the commission to waive regulatory requirements applicable to telecommunications providers if it determines that competition will serve the same purpose as public interest regulation. Similarly, HAR § 6-80-135 permits the commission to waive the applicability of any of the provisions of HRS chapter 269 or any rule, upon a determination that a waiver is in the public interest.

For the matters of this docket, the commission finds, at this time, that XOCS is a non-dominant carrier in the State.⁵ The commission also finds that the Proposed Refinancing is consistent with the public interest, and that competition, in this instance, will serve the same purpose as public interest regulation. Thus, the commission concludes that the requirements

⁵The docket record indicates that as of 2004, XOCS served only 21 customers in the State. See CA's SOP at 6.

of HRS §§ 269-17 and 269-19 should be waived, to the extent applicable,⁶ with regards to the matters in this docket, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.⁷ Similarly, based on these findings and conclusions stated above, the commission also waives the provisions of HAR §§ 6-61-101 and 6-61-105, to the extent that the Petition fails to meet any of these filing requirements.

B.

Compliance with HAR § 6-80-91(d)

HAR § 6-80-91(d) requires telecommunication carriers that operate in the State and submit Annual Financial Reports with the commission to serve a copy of such reports on the Consumer Advocate. Given the Consumer Advocate's representation that it had not received copies of XOCS's Annual Financial Reports for the years ended December 31, 2005, through December 31, 2007, the commission finds it reasonable to require

⁶While seeking commission approval of its participation in the Proposed Refinancing, XOCS states that it is doing so without prejudice to its right to assert that this transaction is beyond the jurisdiction of state commissions. See Petition at 1 n.1. As the commission has found that a waiver is appropriate, it need not address this issue.

⁷The commission will continue to examine each application or petition and make determinations on a case-by-case basis as to whether the applicable requirements of HRS §§ 269-17 or 269-19 should be waived. Thus, our waiver in this instance should not be construed by any public utility, including XOCS, as a basis for not filing an application or petition regarding similar transactions that fall within the purview of these statutes.

XOCS to submit copies of such reports to the Consumer Advocate, and provide notice of compliance with this requirement to the commission.

III.

Orders

THE COMMISSION ORDERS:

1. The requirements of HRS §§ 269-17 and 269-19, to the extent applicable, are waived with respect to the Proposed Refinancing, described in the Petition filed on March 24, 2008.

2. The filing requirements of HAR §§ 6-61-101 and 6-61-105, to the extent applicable, are also waived.

3. As soon as reasonably possible, XOCS shall serve on the Consumer Advocate copies of its Annual Financial Reports for the years ended December 31, 2005, through December 31, 2007, consistent with HAR § 6-80-91(d), and provide notice of compliance with this requirement to the commission.

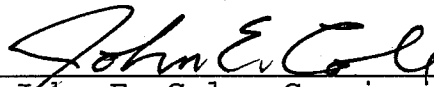
4. Unless ordered otherwise by the commission, this docket shall be deemed closed upon XOCS's compliance with ordering paragraph no. 3, above.


DONE at Honolulu, Hawaii

MAY 23 2008

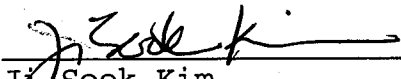
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By: 
Carlito P. Caliboso, Chairman

By: 
John E. Cole, Commissioner

By: 
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


Ji Sook Kim
Commission Counsel

2008-0053.laa

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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